UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA,	§	
	§	
VS.	§	CRIMINAL ACTION NO. 2:19-CR-114-1
	§	
SALVADOR FLORES, JR.,	§	
	§	
Defendant.	§	

ORDER DENYING MOTION TO SUPPRESS

Defendant Salvador Flores, Jr. is charged by indictment with one count of conspiracy to distribute a controlled substance and one count of possession with intent to distribute a controlled substance. D.E. 12. Before the Court is his motion to suppress (D.E. 29) and the Government's response (D.E. 31). A hearing on the motion was held on May 23, 2019, and both parties filed additional briefing (D.E. 37; D.E. 38). For the following reasons, the Court DENIES the motion to suppress (D.E. 29).

FACTS

On January 19, 2019, Border Patrol Agent Santiago De Leon (Agent De Leon) was working pre-primary inspection duties with his canine, Tina, at a border patrol checkpoint near Sarita, Texas. Under Agent De Leon's direction, Tina performed free-air sniffs of passing vehicles as they entered the checkpoint. Agent Gicela Flores (Agent Flores) was in the primary inspection area, conducting immigration inspections.

Shortly before 5:00 p.m., a red 2011 Chevrolet Silverado entered the checkpoint, passing Agent De Leon and his canine without incident. Once the truck pulled into primary inspection, Agent Flores asked the driver, Defendant Santiago Flores, Jr.

(Flores), and the passenger questions about their citizenship and destination. Agent Flores saw no luggage in the vehicle and mentioned that to the occupants. She noted that they appeared nervous and they stated that there were items in the back.

Meanwhile, Agent De Leon approached the driver's side of the truck and spotted a spare tire covered in dried mud underneath the bed of the truck. From his experience, Agent De Leon is aware that drug smugglers are known to hide drugs in spare tires. Because touching a tire can leave fingerprints, smugglers cover the tire with mud to conceal signs that the tire was recently handled. Agent De Leon did not see mud anywhere else on the truck, leading him to believe that the mud was intentionally smeared on the tire.

Agent De Leon tapped the top of the truck's bed to command Tina to "hunt", prompting her to place her front paws on the left rear tire and sniff above the truck's bed. She did not alert. Agent De Leon then kneeled behind the truck and tapped the spare tire with his fingers. He stated the tire felt solid as if it was filled with sand. He once again commanded Tina to sniff. She approached the tailgate area from the driver's side of the vehicle and immediately alerted to the presence of contraband.

Defendant Flores was instructed to pull into the secondary inspection area. A search of the vehicle uncovered 104 bundles of marijuana in the spare tire and the gas tank, totaling approximately 68 kilograms of marijuana.

Agent De Leon testified that he has been a Border Patrol agent since 2007 and has spent his entire career in the Kingsville, Texas area. He attended the Border Patrol Academy, trained to become a canine handler in 2009, and became certified as a canine

instructor in 2014. He has received awards for canine handling and training. In his estimation, he has discovered 30 million dollars' worth of smuggled drugs and has been involved in 20 investigations where drugs were found in spare tires, five of which were detected by him.

Arguing that Agent De Leon conducted an illegal search by tapping the spare tire, Defendant Flores moves to suppress any evidence seized.

DISCUSSION

The Fourth Amendment provides the right to be free of unreasonable searches and seizures absent probable cause or a warrant. U.S. Const. amend. IV. The customary remedy for a Fourth Amendment violation is to exclude the illegally-obtained evidence. *Mapp v. Ohio*, 367 U.S. 643, 648 (1961). When a defendant is subject to a warrantless search, the government bears the burden of showing that the search falls under an exception to the exclusionary rule. *United States v. Roch,* 5 F.3d 894, 897 (5th Cir. 1993).

Defendant Flores challenges Agent De Leon's tapping of the spare tire as an unlawful search. The Government argues that: (1) Agent De Leon had probable cause to tap the tire; (2) his action was not a Fourth Amendment search under law existing at that time; and (3) the canine would have alerted to the marijuana so it would have been inevitably discovered.

A. There was Probable Cause for the Search

Probable cause alone is sufficient to justify a warrantless vehicle search. *United States v. Muniz-Melchor*, 894 F.2d 1430, 1437 (5th Cir. 1990). Probable cause is

established "when trustworthy facts and circumstances within the officer's personal knowledge would cause a reasonable prudent man to believe that the vehicle contains contraband." *United States v. Banuelos-Romero*, 597 F.3d 763, 767 (5th Cir. 2010) (citation omitted). Probable cause is "a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules." *Florida v. Harris*, 568 U.S. 237, 244 (2013) (citation omitted).

"The evidence presented in support of [] a [probable cause] determination must be viewed in light of the observations, knowledge, and training of the law enforcement officers involved in the warrantless search." *Muniz-Melchor*, 894 F.2d at 1438. Courts give "due deference to the experience of officers . . . in identifying a number of factors that, although insufficient by themselves to suggest illegal activity, taken together are indicia of certain types of illicit acts." *United States v. Sanchez-Pena*, 336 F.3d 431, 437 (5th Cir. 2003). Accordingly, courts look to the totality of the circumstances to determine whether probable cause exists. *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003).

The Government cites to *Texas v. Brown*, 460 U.S. 730 (1983), to argue that the distinct condition of the muddy spare tire was enough to support probable cause. During a routine traffic stop, the officer in *Brown* saw a knotted balloon fall from the defendant's hand. *Id.* at 733. The officer knew that narcotics are frequently packaged in balloons and "the distinctive character of the balloon itself spoke volumes as to its contents—particularly to the trained eye of the officer." *Id.* at 743. In holding that the officer had probable cause to seize the balloon, the Supreme Court considered the officer's previous

experience with narcotic arrests, his discussions with other officers about the frequent use of balloons to carry narcotics, and his observation of other drug-related items in the vehicle. *Id.* at 742-43.

Defendant Flores argues that the distinctive character of the balloon in *Brown* is not analogous to a truck's spare tire. Agent De Leon testified that there is a "big difference" in appearance between a spare tire with normal dirt on it and a spare tire with intentionally placed mud on it. And the muddy tire stood out on the relatively clean truck. Giving deference to the experience of Agent De Leon and the totality of the circumstances, the Court finds that the spare tire had the distinct characteristic of having been intentionally smeared with mud and placed on a truck traveling north of the border.

Agent De Leon's extensive experience in detecting illegal drugs assisted him in developing probable cause to believe that the spare tire contained contraband. Because he had probable cause to believe that the spare tire contained drugs, the tapping of the spare tire was lawful under the Fourth Amendment.

B. The Exclusionary Rule Does Not Apply

The Government argues that even if Agent De Leon did not have probable cause, the exclusionary rule should not apply because his actions did not constitute a Fourth Amendment search under then existing Fifth Circuit law. Weeks after the events in this case, the Fifth Circuit held that tapping a tire to gain information about its contents constitutes a search under the Fourth Amendment. *United States v. Richmond*, 915 F. 3d 352, 358 (5th Cir. 2019).

The Government submits that Agent De Leon's actions were governed by the reasonable expectation of privacy test set forth in *Muniz-Melchor*, 894 F. 2d at 1497, decided in 1990. Defendant Flores argues that the tapping of a spare tire is a search, triggering Fourth Amendment protections under the trespass test set forth in *United States v. Jones*, 565 U.S. 400 (2012).

In *Muniz-Melchor*, the Fifth Circuit held that tapping a truck's propane tank is not a Fourth Amendment search because a driver has a reasonable expectation that someone will touch his propane tank. 894 F.2d at 1435. Thus, there is no invasion of property rights. *Id.* In *Jones*, the Supreme Court addressed the issue of a GPS device that had been placed on the defendant's vehicle. In applying the trespass test, the Court held that a Fourth Amendment search occurs when the government obtains information by physically intruding on a constitutionally protected area. *Id.* at 406. *Jones* did not directly address whether a part of a vehicle, such as a tire, is a constitutionally protected area under the trespass test.

The sole purpose of excluding illegally obtained evidence is "to deter future Fourth Amendment violations." *Davis v. United States*, 564 U.S. 229, 236–37 (2011). Because of the high cost to the truth and public safety of suppressing evidence, "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." *Id.* at 232. Where suppression does not further appreciable deterrence, the exclusion of evidence is not warranted. *United States v. Janis*, 428 U.S. 433, 454 (1976). Generally, when the police exhibit deliberate, reckless,

or grossly negligent disregard for Fourth Amendment rights, the benefits of exclusion tend to outweigh the costs. *Herring v. United States*, 555 U.S. 135, 145 (2009).

Agent De Leon testified that he was taught that tapping a tire during primary inspection was lawful. He stopped this practice after the *Richmond* opinion. There is no evidence that Agent De Leon's actions were deliberate, reckless, or grossly negligent in following the *Muniz-Melchor* precedent. Thus, the Court finds that the exclusionary rule does not apply here.

In the alternative, the Government argues that the inevitable discovery exception to the exclusionary rule applies. Because the Court has found that there was probable cause for the search and in the alternative, that the exclusionary rule does not apply based on precedent, the Court does not reach this issue.

CONCLUSION

For the foregoing reasons, Defendant Salvador Flores, Jr.'s motion to suppress (D.E 29) is DENIED.

ORDERED this 29th day of July, 2019.

NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE